Supreme Court, U.S.
FILED
FEB 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1035

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

NORTHSIDE SANITARY LANDFILL, INC., PETITIONER

v.

WILLIAM K. REILLY, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
LAWRENCE E. BLATNIK
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

16 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioner was precluded from raising on appeal certain objections to the listing of its landfill site on the National Priorities List, which is a prerequisite to remedial action paid by the "Superfund," because the objections had not been properly presented to the United States Environmental Protection Agency (EPA) during the administrative rulemaking process.

2. Whether the EPA's decision to include petitioner's landfill site on the National Priorities List was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

American Iron & Steel Institute v. *EPA*, 526 F.2d 1027 (3d Cir. 1975), cert. denied, 435 U.S. 914 (1978)	7
Brock v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986)	10
City of Seabrook v. *EPA*, 659 F.2d 1349 (5th Cir. 1981), cert. denied, 459 U.S. 822 (1982)	8
City of Stoughton v. *EPA*, 858 F.2d 747 (D.C. Cir. 1988)	11
Eagle-Picher Industries, Inc. v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985)	2
Eagle-Picher Industries, Inc. v. *EPA*, 822 F.2d 132 (D.C. Cir. 1987)	11
Glass Packaging Institute v. *Regan*, 737 F.2d 1083 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984)	7
Mada-Luna v. *Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987)	10
McKart v. *United States*, 395 U.S. 185 (1969)	6
National R.R. Passenger Corp. v. *ICC*, 610 F.2d 881 (D.C. Cir. 1979)	7
Pacific Gas & Electric Co. v. *FPC*, 506 F.2d 33 (D.C. Cir. 1974)	10
Safir v. *Kreps*, 551 F.2d 447 (D.C. Cir.), cert. denied, 434 U.S. 820 (1977)	6
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978)	7, 8

Statutes and regulations: Page

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 553(c) 5
5 U.S.C. 553(e) 9
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601-9657 (1982 ed. & Supp. IV 1986) 2
§ 101(23), 42 U.S.C. 9601(23) 3
§ 101(24), 42 U.S.C. 9601(24) 3
§ 104, 42 U.S.C. 9604 2
§ 106, 41 U.S.C. 9606 3
§ 111, 42 U.S.C. 9611 2
§ 113(a), 42 U.S.C. 9613(a) 11
§ 120, 42 U.S.C. 9620 (Supp. IV 1986) 3
Resource Conservation and Recovery Act, 42 U.S.C. 6901-6991 (1982 ed. & Supp. IV) 5
Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981) 2
Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (1987) 2
40 C.F.R. Pt. 300:
Section 300.66(c)(2) 3
Section 300.68(a) 3
App. A 2

Miscellaneous:

47 Fed. Reg. (1982):
p. 31,187 2
p. 31,192 3
48 Fed. Reg. (1983):
p. 40,658 2
p. 40,660 2
pp. 40,674-40,682 3
p. 40,674 4
49 Fed. Reg. (1984):
pp. 37,070-37,090 4
S. Rep. No. 848, 96th Cong., 2d Sess. (1980), *reprinted in* 1 Senate Comm. on Environment & Pub. Works, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation, & Liability Act of 1980* at 367 (Comm. Print 1983) 3

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1035

NORTHSIDE SANITARY LANDFILL, INC., PETITIONER

v.

WILLIAM K. REILLY, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 849 F.2d 1516.

JURISDICTION

The judgment of the court of appeals (Pet. App. A12-A13) was entered on March 25, 1988. A petition for rehearing was denied on August 31, 1988 (Pet. App. A15-A16). The petition for a writ of certiorari was filed on December 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

(CERCLA), 42 U.S.C. 9601-9657 (1982 ed. & Supp. IV 1986), in response to increasing public concern over the dangers to human health and the environment from sites containing harmful substances. CERCLA authorizes the United States Environmental Protection Agency (EPA)[1] to respond to actual and threatened releases of "hazardous substances" and those "pollutants or contaminants" the release of which may present "an imminent and substantial danger to the public health or welfare." Sec. 104, 42 U.S.C. 9604. It also establishes a fund (the Superfund) to pay for response actions taken by the EPA. Sec. 111, 42 U.S.C. 9611. The EPA developed the Hazard Ranking System to rank the relative danger posed by contaminated sites. 40 C.F.R. Pt. 300, App. A. A Hazard Ranking System score represents an estimate of the "probability and magnitude of harm to the human population or sensitive environment from exposure to hazardous substances as a result of contamination of ground water, surface water, or air." 47 Fed. Reg. 31,187 (1982).[2]

Sites receiving a Hazard Ranking System score of 28.50 or greater are included on the National Priorities List. 48 Fed. Reg. 40,658, 40,660 (1983). The National Priorities List serves "primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant remedial actions. Inclusion of a facility or site on the list does not in itself reflect a judgment of the activities of its owner or

---

[1] Although Congress conferred the authority for administering CERCLA on the President, most of that authority has since been delegated to the EPA Administrator. See Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981); Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (1987).

[2] The Hazard Ranking System model for scoring sites was upheld by the District of Columbia Circuit in *Eagle-Picher Industries, Inc.* v. *EPA*, 759 F.2d 905 (1985).

operator, it does not require those persons to undertake any action, nor does it assign liability to any person. Subsequent government action in the form of remedial actions or enforcement action [is] necessary in order to do so, and these actions [are] attended by all appropriate procedural safeguards." S. Rep. No. 848, 96th Cong., 2d Sess. 60 (1980), *reprinted in* 1 Senate Comm. on Environment & Public Works, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation, & Liability Act of 1980* at 367 (Comm. Print 1983). A facility must be listed on the National Priorities List before any Superfund-financed remedial action can be undertaken at the site.[3] 47 Fed. Reg. 31,192 (1982); see 40 C.F.R. 300.66(c)(2) and 300.68(a). That is the only substantive effect of listing a nonfederal site on the National Priorities List.[4]

2. Petitioner Northside Sanitary Landfill, Inc., operates a landfill near Zionsville, Indiana, that was included on the EPA's first annual update to the National Priorities List, which was published as a proposed rule in September 1983. 48 Fed. Reg. 40,674-40,682 (1983). The Northside site received a Hazard Ranking System score of 46.04, well above the 28.50 cutoff point for inclusion on

---

[3] The response actions authorized by CERCLA include both "removal" and "remedial" actions. Removal actions generally are interim measures necessary to prevent, minimize, or mitigate damage to human health or the environment. Sec. 101(23), 42 U.S.C. 9601(23). Remedial actions are those associated with a long-term or permanent remedy. Sec. 101(24), 42 U.S.C. 9601(24). Listing on the National Priorities List is not a prerequisite to removal actions, remedial action taken by private parties, or enforcement actions under Section 106 of CERCLA, 42 U.S.C. 9606.

[4] The listing of a site owned or operated by the United States or its agencies triggers additional requirements under Section 120 of CERCLA, 42 U.S.C. 9620 (Supp. IV 1986). Petitioner's site is privately owned and operated and therefore is not subject to Section 120.

the National Priorities List. The EPA gave interested parties 60 days to submit comments on the proposed National Priorities List update. *Id.* at 40,674.

Petitioner did not submit comments on the proposed listing of its site on the National Priorities List until more than two-and-a-half months after expiration of the comment period. Its "comments" consisted of 420 pages of geological studies, water quality evaluations, and correspondence relating to the Northside site, accompanied by a letter from petitioner's president requesting that "the Agency review these documents even though not summited [*sic*] by November 7, 1983, since we were not advised of that date." The letter briefly described the 11 documents submitted by petitioner, but did not identify the issues that petitioner believed were raised by the documents or specify petitioner's objections to the manner in which the EPA had applied the Hazard Ranking System in scoring its landfill site. Pet. App. A5.

Although petitioner's "comments" were not timely filed and did not allege any specific deficiencies in the scoring process, the EPA reviewed the documents petitioner submitted and wrote a 14-page response to the argument they appeared to raise, which was that the contamination found in surface water and wells near petitioner's landfill site was most likely caused by another hazardous site. The EPA did not alter its conclusion that the Northside site had been properly scored and should be listed on the National Priorities List. Pet. App. A6. Accordingly, the site was included on the first National Priorities List update, which was promulgated as a final rule in September 1984. 49 Fed. Reg. 37,070-37,090 (1984).

3. In the court of appeals, petitioner attempted to challenge the listing of its site on the National Priorities List by arguing, among other things, that (1) the EPA's

listing of the site violated the agency's policy regarding the inclusion on the National Priorities List of sites that are regulated pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901-6991 (1982 ed. & Supp. IV 1986); (2) that the EPA's scoring of the site under the Hazard Ranking System was not adequately documented and not supported by the record evidence; and (3) that the EPA failed to review and conduct quality assurance audits on documentation relied upon by the State of Indiana in scoring the site. The court of appeals denied the petition for review, concluding that petitioner was barred from raising these objections for the first time in court in support of its petition for review (Pet. App. A7-A11). The court found that "by neglecting timely to put the EPA on proper notice of its objections, Northside has forfeited its right to have this court examine those objections on the merits" (*id.* at A7).

The court of appeals noted that while petitioner belatedly submitted 420 pages of documents as "comments" on the proposal to list its site on the National Priorities List, "it made no attempt to specify *why* it considered those documents or anything in them relevant to the rulemaking proceeding" (Pet. App. A7 (emphasis in original)). The court rejected petitioner's argument that the notice-and-comment rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553(c), do not require such specificity, and instead concluded that "common sense and case law dictate that Northside should have assumed at least a modicum of responsibility for flagging the relevant issues which its documentary submissions presented" (Pet. App. A8). After full briefing and a review of the record in this case, the court found that neither the transmittal letter from the company's president nor any of the submitted documents "made clear the objections which Northside now contends that it was making" (*id.* at A9). The court found it to be "quite clear that Northside's com-

ments did not alert the EPA to any of the contentions which Northside presses before us" (*ibid.*).

Because of its conclusion that "Northside did not properly present its objections to the EPA during the rulemaking process," the court of appeals found it unnecessary to address the merits of those objections (Pet. App. A11). However, the court stated that, on the merits, it would "still deny Northside's petition for review because the EPA's decision to place the Northside site on the [National Priorities List] finds ample support in the record * * * [and] was in no way arbitrary or capricious" (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 18-21) that a party cannot be precluded from raising for the first time in a reviewing court issues that it never presented to the agency in the underlying administrative proceedings unless the governing statute either expressly provides for the exclusion of such issues or provides a right to an adjudicatory hearing. This contention is incorrect. The rule that a party is barred from challenging agency action in court based on objections that it never presented to the agency at the administrative level is derived from the general principle of administrative law that exhaustion of administrative remedies is required. See *McKart* v. *United States*, 395 U.S. 185, 193 (1969) ("[t]he doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law"); *Safir* v. *Kreps*, 551 F.2d 447, 452 (D.C. Cir.) ("exhaustion * * * is a generally recognized common law principle"), cert. denied, 434 U.S. 820 (1977). Accordingly, the rule has been applied even where the governing statute was not found to contain any express limitation on a party's subsequent ability to raise issues not presented to the agency, and the party challenging agency action did not participate in a hearing. See

Glass Packaging Institute v. *Regan,* 737 F.2d 1083, 1093 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984); *National R.R. Passenger Corp.* v. *ICC,* 610 F.2d 881, 887 n.27 (D.C. Cir. 1979); *American Iron & Steel Institute* v. *EPA,* 526 F.2d 1027, 1050 (3d Cir. 1975), cert. denied, 435 U.S. 914 (1978). Indeed, in a case almost identical to the present one, the District of Columbia Circuit held that an issue not raised before the EPA in the public comment period on a National Priorities List site could not be raised in a subsequent judicial challenge. *Eagle-Picher Industries, Inc.* v. *EPA,* 822 F.2d 132, 146 & n.78 (1987).

Correspondingly, in *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519 (1978), this Court ruled that parties participating in an administrative proceeding must "structure their participation so that it is meaningful, so that it alerts the agency to [their] position and contentions" (*id.* at 553). The Court admonished that "administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.' " *Id.* at 553-554. Contrary to petitioner's suggestion (Pet. 19), the Court's conclusion in *Vermont Yankee* that an intervenor was precluded from raising certain arguments was not based on the prior availability of an adjudicatory hearing, but rather on the fact that the intervenor "decline[d] to further focus its contentions, [and] virtually declined to participate" before the agency. 435 U.S. at 554.

While petitioner attempts (Pet. 19-20) to distinguish that case on the basis of its submission of 420 pages of documents to the EPA as "comments" on the proposed listing of its site, the critical factor relied upon by the court

of appeals here was that, as in *Vermont Yankee,* petitioner failed to specify the particular objections it sought to raise through those documents (Pet. App. A9-A10). Petitioner attempts to shift the burden to the EPA, suggesting that the agency should have requested clarification of its comments (Pet. 19, 21). However, *Vermont Yankee* makes clear that it is incumbent upon the party challenging agency action to adequately apprise the agency of its position and contentions (435 U.S. at 553). In light of its receipt of a total of 5,838 pages of comments on the 140 sites proposed for listing on the first National Priorities List update and the fact that inclusion on the List is merely a first step in the remedial process, the EPA could hardly be expected to have made inquiries of individual commenters to insure that their comments had been properly articulated.

2. Petitioner also argues (Pet. 13-18) that it was not given sufficient notice that the EPA was considering the Northside site for placement on the National Priorities List, and attempts to invoke the Fifth Circuit's statement that a person "who wishes to protect himself from arbitrary agency action" should not have to "become a faithful reader of the notices of proposed rulemaking published each day in the *Federal Register.*" *City of Seabrook* v. *EPA,* 659 F.2d 1349, 1360-1361 (1981), cert. denied, 459 U.S. 822 (1982).[5] There is no basis for that complaint.

---

[5] Contrary to petitioner's suggestion, the *City of Seabrook* decision is plainly distinguishable from the decision below. In that case, the Fifth Circuit recognized that a party challenging an administrative rulemaking determination cannot merely assert that there was no evidence to support the agency's conclusion, but "must at least articulate some reason why the agency's actions may be arbitrary or capricious" (659 F.2d at 1360). The court concluded that, under the circumstances presented there, the petitioners should not be estopped from raising an objection not raised clearly during the notice and comment period because it found that other objections that the petitioners

Even if petitioner could not fairly be charged with knowledge that its site had been listed in the proposed update to the National Priorities List because that proposal had been published in the Federal Register in September 1983, it in fact learned that the EPA had proposed to add its site to the List. Although its comments in response were not timely filed, the EPA considered them before issuing its final rule.

Petitioner also complains that it never received the EPA's 14-page response to its submission, which the EPA did not publish in the Federal Register but instead referenced at the time it published its final rule. Petitioner suggests that it is unreasonable to expect it to have asked for a copy of that response, and then, upon determining that the EPA had not fully understood its objections, to have asked for reconsideration of the EPA's decision. There is no merit at all to that argument. Since petitioner had learned that its site had been proposed for inclusion on the National Priorities List and had submitted documents in response, it did not have to comb the Federal Register, as it suggests, but merely had to be alert for publication of the EPA's final rule, review it, and take appropriate action at that time. That is not a particularly burdensome requirement to impose on a company that operates a landfill that has been determined to be hazardous.[6]

---

had made, together with the express language of the governing statute, provided the agency with "sufficient notice" of the issue (*id.* at 1361). The court below properly reached a contrary conclusion on the facts of this case.

[6] Petitioner also errs by complaining (Pet. 15) that the EPA had not expressly provided for reconsideration of its final rule, making it "impossible" for it to seek reconsideration. The Administrative Procedure Act provides that agencies must give interested persons the right to petition for repeal of a final rule (5 U.S.C. 553(e)), and the EPA presumably would have followed the law if petitioner had invoked it.

3. Petitioner also reasserts (Pet. 21-24) one of its substantive objections to the EPA's decision to list its site on the National Priorities List by contending that, in listing the Northside site, the EPA violated its own policy against listing sites that are regulated pursuant to RCRA. As we have noted, the court of appeals found it unnecessary to address the merits of petitioner's objections because of its failure to properly preserve those issues for judical review. Accordingly, petitioner's challenge to the agency's decision on the merits is not properly presented for review by this Court.

In any event, there is no merit to petitioner's contention. As it points out, in the final rule on the original National Priorities List, the EPA adopted a general policy of not listing those RCRA facilities consisting solely of "regulated units," *i.e.*, units that are subject to RCRA land disposal regulations (Pet. App. A63).[7] However, the EPA also stressed that it would continue to include on the National Priorities List those RCRA facilities at which "a significant portion of the release appears to come from 'nonregulated units' of the facility"—*i.e.*, units that ceased operation prior to the January 1983 effective date of the RCRA land disposal regulations (*id.* at A64, A70). In this case, the EPA reasonably concluded that the Northside site fell within the latter category, and therefore should be

---

[7] The preamble to the final rule on the original National Priorities List makes clear that this was intended to be only a statement of policy: "Given this alternative authority to ensure cleanup, regulated units of RCRA facilities *generally* are not included on the NPL." Pet. App. A63 (emphasis added). It is well established that such policy statements are not binding rules, but allow for the exercise of informed discretion. *Mada-Luna* v. *Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987), and cases cited; *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537-538 (D.C. Cir. 1986); *Pacific Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).

included on the National Priorities List, on the basis of evidence contained in the rulemaking record which showed that a sizable portion of the Northside facility known as the West Farm or Old Farm had ceased accepting hazardous wastes for disposal prior to the effective date of the RCRA land disposal regulations. Review of this evidentiary issue by this Court would not be warranted even if it were otherwise properly presented.

4. Petitioner also contends (Pet. 24-28) that the court of appeals' decision amounted to a "rubber-stamp" of the EPA's determination to list its landfill site on the National Priorities List. In light of petitioner's procedural default, the court of appeals had no occasion to reach the merits of that determination at all. However, as we have noted, the court of appeals did state that the EPA's decision to place the Northside site on the National Priorities List was amply supported by the record and was not arbitrary or capricious. Furthermore, since review of EPA rulemaking pursuant to CERCLA, such as the listing of sites on the National Priorities List, is committed exclusively to the District of Columbia Circuit by Section 113(a) of CERCLA, 42 U.S.C. 9613(a), no possibility of a conflict among the circuits exists with respect to such issues.[8]

---

[8] The District of Columbia Circuit has upheld the EPA's decisions to add sites to the National Priorities List in the only other reported cases. *City of Stoughton* v. *EPA*, 858 F.2d 747, 749-756 (1988); *Eagle-Picher Industries, Inc.* v. *EPA*, 822 F.2d 132, 137-151 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
DONALD A. CARR
Acting Assistant Attorney General
LAWRENCE E. BLATNIK
Attorney

FEBRUARY 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00129